

August 20, 2018

Marlene Dortch, Esq.
Secretary
Federal Communications Commission
445 12th Street S.W.
Washington DC 20554

Re: Broadcast Incubators, MB Docket No. 17-289

Dear Ms. Dortch:

On Friday, August 17, a telephone call was held with Matthew Berry, Chief of Staff. Participating on the call were Advisory Committee on Diversity and Digital Empowerment (“ACDDE”) members James Winston and myself (the “FAC Members”). The FAC Members participated in the call on their own behalf and on behalf of FAC Broadcast Development Working Group Chair Henry Rivera, FAC Vice Chair Diane Sutter, and FAC Member DuJuan McCoy.

We began by expressing our deep appreciation for the issuance of the Incubator order after years of delay, and especially for the Commission’s inclusion of thoughtful new language (following the White Copy) that encourages the participation of HBCUs and other mission-based institutions as well as Native American Nations. *Compare Rules and Policies to Promote New Entry and Ownership Diversity in the Broadcasting Services (R&O)*, FCC 18-114 (released August 3, 2018) (“Incubators R&O”) at ¶30, with the July 12, 2018 White Copy at ¶29.

The discussion on our telephone call primarily concerned the definition of “comparable markets” in the Incubators R&O, ¶¶68-69. We flagged this matter initially at the White Copy stage, when it first arose. *See* David Honig and James Winston *Ex Parte* Letter, MB Docket 17-289 (July 26, 2018), p. 2, item 4.

While we do not agree with every one of the many decisions the Commission had to make in creating the incubator program, we’re at peace with all of them except this “comparable markets” definition. It is the only one that threatens to destroy the entire program. This definition permits a broadcaster to incubate a station in any small market with 45+ full power stations (*e.g.*, Traverse City-Petoskey-Cadillac) and, in return, receive an assignable waiver of the 8-station rule usable in any other 45+ market (like New York City).

Mr. Winston and I first noted that there had been no notice of the proposed new definition, which treats markets as small as Traverse City-Petoskey-Cadillac as “comparable” to New York City simply because each is home to 45 or more full power radio stations. The notion that a market with fewer than 350,000 people and 63 stations is in any sense “comparable” to a market of over 19,000,000 people with 153 stations¹ is new to communications law and broadcast industry practice, and was not a logical outgrowth of any earlier proceeding.

Further, we noted that in the 28 years that this matter has been pending in seven dockets, not one broadcaster had objected to the incubator concept on the grounds of insufficiency of incentives. Thus the new comparable markets definition is a classic “solution in search of a problem.”

The new comparable markets definition would profoundly distort the incubator program by creating unprecedented and gigantic incentives to incubate in relatively small (and often non-diverse) markets in order to obtain a “coin” entitling the holder to sell another broadcaster a consolidation waiver in a very large market.²

¹ *See Investing in Radio Market Report 2018 (First Edition)* (comparing Traverse City-Petoskey-Cadillac to New York City).

² We do not object to the opportunity to sell a waiver opportunity to another qualified broadcaster, as this option would enhance diversity incentives without sacrificing structural diversity. MMTC has long advocated for the creation of a form of market-tradable diversity credits. *See* Letter to Hon. Tom Wheeler from Kim Keenan, President, and David Honig, President Emeritus, MMTC, June 24, 2016, 2014

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With an opportunity to generate financial returns of 100-fold or more (representing the economic value of such a waiver divided by the cost of a small market incubation), no rational broadcaster would incubate in any other manner. Thus, the incubation proposal would suddenly have been converted into little more than an engine of large market consolidation. There would be no incubation of new entrants in most of the markets where people of color reside and are building their careers.³ This is not what NABOB and MMTC had in mind when they worked for 28 years to secure the establishment of an incubation program.

Finally, we pointed out that the eligible entity definition in the new rules was dependent for its key premise that it would not produce a racially dilute applicant pool. The supporting racial statistics were drawn from broadcast auctions nationwide (*see* Incubators R&O ¶¶20-24). However, only a handful of markets (such as Traverse City-Petoskey-Cadillac, Greenville-New Bern-Jacksonville, Wilkes Barre-Scranton, Des Moines, Portland, ME, and Burlington-Plattsburgh) – all relatively small but having at least 45 full power stations – are likely to germinate incubators in light of the new comparable markets definition. Further, the markets where most people of color reside would seldom, if ever, germinate incubators. Thus, the key statistical premise underlining the eligible entity definition would no longer have any validity. That defect alone has the effect of invalidating the entire program.

As a solution, we recommended defining comparable markets above 45 stations as a “range of markets” – more than five (or some other reasonable number of) Nielsen Audio Market Rank sizes removed in either direction from the incubated station’s market. We suggested that the Commission try this limitation for two years. Should it prove unsuccessful, the Commission (presumably essentially the same commission as the one sitting now) could then revisit the matter. We noted that the reverse scenario (allowing the plan contained in the Incubators R&O to go into effect, then revisiting it later) would *not* work, since in practice once a rule is relaxed, it is never tightened.⁴

This letter is being filed electronically pursuant to Section 1.1206 of the Commission’s Rules.

Sincerely,

David Honig

David Honig
1919 Pennsylvania Ave. N.W., Suite 725
Washington, D.C. 20006
202-669-4533
david@davidhonig.org

cc: Matthew Berry

Quadrennial Review, MB Dockets 14-50, 09-182 and 07-294 (June 24, 2016), pp. 7-8, Proposal 37 (“Engage Economist to Develop a Model for Market-Based Tradable Diversity Credits as an Alternative to Voice Tests”), noting that this concept was first developed by the Advisory Committee on Diversity for Communications in the Digital Age in 2004.

³ We tentatively predict that little or no incubation would occur in (approximately) markets 1-60 and nearly all markets ranking below 80.

⁴ And with good reason. Those who made business plans based on the relaxed rules, in good faith, would have a strong argument that the Commission acted arbitrarily in letting only the well-financed first-comers exploit a lucrative opportunity before shutting the door to others.